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(1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FRANK BATTLE, SR,

Petitioner,

v.

J. RONNIE WEBB,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Filed on

QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE EXECUTED SEARCH WARRANT, WHICH CONTAINED NO PARTICULARITY OF DESCRIPTION OF THE PLACE TO BE SEARCHED OR THINGS TO BE SEIZED AND WAS NOT ACCOMPANIED BY A COPY OF THE AFFIDAVIT, WAS NOT A VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

2. DID THE COURT OF APPEALS ERR IN HOLDING THAT RESPONDENT-WEBB, WHO PREPARED AND EXECUTED THE SEARCH WARRANT, WAS ENTITLED TO QUALIFIED IMMUNITY?

PARTIES AND DISCLOSURE STATEMENT

The parties to the proceeding in the Court of Appeals whose judgment is sought to be reviewed are contained in the caption. There is no corporation involved.

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PREFACE

1. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SEARCH WARRANT, WHICH CONTAINED NO PARTICULARITY OF

DESCRIPTION AND WAS NOT ACCOMPANIED BY A COPY OF THE AFFIDAVIT, WAS NOT A VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

2. THE COURT OF APPEALS ERRED IN HOLDING THAT WEBB, WHO PREPARED AND EXECUTED THE SEARCH WARRANT, WAS ENTITLED TO QUALIFIED IMMUNITY BECAUSE BATTLE'S RIGHTS TO BE NOTIFIED AT THE TIME OF THE SEARCH AND SEIZURE OF THE PARTICULARITY OF DESCRIPTION WERE NOT CLEARLY ESTABLISHED.

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OPINIONS AND ORDERS BELOW

There is no published opinion of the courts below.

JURISDICTION IN THE SUPREME COURT

On October 31, 2008, a panel of the United States Court of Appeals for the Eleventh Circuit (App. 19) affirmed the judgment of the United States District Court for the Northern District of Georgia, in an unpublished opinion. (App. 17)

On January 8, 2009, the United States Court of Appeals for the Eleventh Circuit denied Petitioner's petition for rehearing and for rehearing en banc. (App. 26)

On January 16, 2009, the United States Court of Appeals for the Eleventh Circuit granted stay of issuance of the mandate pending petition to the Supreme Court for the writ of certiorari. (App 27)

28 U.S.C. 1254(1) confers on this Court jurisdiction to review on a writ of certiorari the above mentioned judgment by the United States Court of Appeals for the Eleventh Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

AMENDMENT FOUR

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT FOURTEEN

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

For clarity, Petitioner, Frank Battle, Sr., will be referred to as "Battle". Respondent, Officer J. Ronnie

Webb, Jr., will be referred to as "Webb". References to the allegations in Battle's complaint (R-1) will be referred to as (Cpl-"paragraph number"). References to the affidavit of counsel, which is attached to Plaintiff's Response to Motion to Dismiss (R-7) and incorporated therein by reference will be (E-"Paragraph number"). References to transcript of the first hearing on motion to suppress in DeKalb Superior Court on the 18th day December, 2002, attached to Plaintiff's Response to Motion to Dismiss will be referred to as (T-1-"page number") (R-7, Exh. B)

On August 29, 2001, a search warrant was sworn out by Webb (Cpl-¶ 5) (R-1) under color of law as agent and employee of the Enforcement Division of the Georgia Board of Workers Compensation. (Cpl, ¶ 4) (R-1) Under Webb's personal leadership, the search warrant was executed at the business of Battle, an insurance agent, in DeKalb County, Georgia. (Cpl-¶ 6)(R-1) Voluminous insurance and personal files of the plaintiff were seized in the search. (Cpl-¶ 7)(R-1)(R-7, P 2)

The search warrant contains the name of the affiant, Webb, the name of the Judge, date and time issued. It does not particularly describe the place to be searched, the things to be seized or the persons whose premises are directed to be searched.

However on the warrant where these particulars are to be set forth, the following words are written in: "See attached affidavit of Agent J. Ronnie Webb." (T-I-44 "Exhibit A")(R-7, P 3)

Webb and the other executing officers left with Battle a copy of the search warrant and a copy of the inventory of items of property seized. (R-7, P 3)

No copy of any affidavit was either attached to or accompanied the search warrant copy that was left with Battle. (E-4)(R-7) This fact was stipulated by the State at the hearing on February 4, 2003. (E-17)(R-7, PP 3, 4)

As a result of the search and seizure and misunderstanding of the facts, Battle was indicted by a DeKalb County Grand Jury under indictment number 02CR3424-10, on August 22, 2002. (Cpl-¶ 9)(R-1)(E-9)(R-7, P 4)

At arraignment on October 9, 2002, Battle filed a motion to suppress evidence unconstitutionally and illegally seized. (E-10)(R-7, P 4) With the Court's permission on January 3, 2003, the motion was amended on January 8, 2003. (E-15, 16)(R-7, P 6)

The first of three hearings of the motion to suppress was on December 18, 2002, sixteen months

after the search and seizure. At the hearing, Webb testified that after talking with Battle's counsel, he sent to him a copy of the search warrant and the affidavit (T-I-56, 57)(R-7) ". . . as a matter of courtesy and professionalism . . .". (T-I-18)(R-7) He testified that the affidavit which he sent to counsel was not the true affidavit. (T-I-13, T-I-29, 30)(Hearing Exhibit "Dt-B)(R-7) Webb testified on that hearing, sixteen months after the search, that the true affidavit was "State's Exhibit I" ("Exh-S-1" in hearing transcript)(E-13)(R-7, PP 4, 5) Webb testified that he did not send a copy of the "true affidavit". (T-I-13, T-I-45 - 48) because he did not want Battle to see the affidavit. (T-I-13 -14)(R-7)

After further hearings in the Superior Court on January 3, and February 4, 2003, (E-12)(R-7), which denied the motion, and interlocutory appeal, the Georgia Court of Appeals affirmed the order of the Superior Court in "Battle I", *266 Ga. App. 532, 597 S.E.2d 417 (2004).* (R-7, P 6)

On petition to the Georgia Supreme Court for the writ of certiorari, Battle cited the case of *Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284, 157 L.Ed.2d 1068 (2004),* just rendered. The Georgia Supreme Court granted the writ of certiorari and remanded the case to the Court of Appeals for further consideration. (R-7, P 6)

On August 31, 2005, the Georgia Court of Appeals, in "Battle II", *275 Ga. App. 301, 620 S.E.2d 506 (2005)*, reversed itself and adjudicated the search and seizure to be unconstitutional in violation of the Fourth Amendment of the Constitution of the United States for the reason that the search warrant totally lacked the particularity of description and no affidavit accompanied the execution of the warrant. (Cpl. ¶ 8, 12)(R-7, P 7)

On November 18, 2005, the Superior Court issued an order of nolle prosequi, permanently dismissing the case. (Cpl. ¶ 15)(R-7, P 7)

In response to the Superior Court's order to return Battle's property to him, some files were returned but a large box of them were not because they had been lost by the admitted negligence of Webb. (Cpl. ¶ 16)(R-7, P 7)

COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE DISTRICT COURT

This is an action filed by Frank Battle, Sr., Petitioner (Battle) against J. Ronnie Webb, Respondent (Webb) under 42 U.S.C. §1983, for violation of Battle's rights under the Fourth Amendment of the United States Constitution,

applicable to the States through the Fourteenth Amendment of the United States Constitution.

On August 27, 2007, Battle filed his complaint in the District Court. (R-1)

Waiver of service was filed on September 28, 2007. (R-2)

Motion by Webb to dismiss was filed on October 10, 2007. (R-4)

Motion to stay proceedings was filed on October 10, 2007. (R-5)

Response by Battle to motion to stay proceedings was filed on October 15, 2007. (R-6)

Response by Battle to motion to dismiss was filed on October 19, 2007. (R-7)

Reply by Webb to response by Battle was filed on November 5, 2007. (R-8)

Order granting motion to stay proceedings was filed on December 11, 2007. (R-9)

Order granting Webb's motion to dismiss was filed on April 16, 2008. (R-10)(APP 1)

Judgment dismissing the action was filed on April 16, 2008. (R-11)(APP 17)

Notice of Appeal by Battle was filed on May 14, 2008. (R-12)

The United States Court of Appeals for the Eleventh Circuit acknowledged the notice of appeal on May 19, 2008. (R-15)

STATEMENT OF FEDERAL JURISDICTION

28 U.S.C. Section 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1291

The United States Courts of Appeals have jurisdiction of appeals from all decisions of the District Courts of the United States.

28 U.S.C. Section 1294(1)

Appeals shall be taken from United States District Courts to the Court of Appeals for the circuit embracing the district.

28 U.S.C. Section 41

The United States Court of Appeals for the Eleventh Circuit embraces the District Courts of the State of Georgia.

ARGUMENT AND CITATION OF AUTHORITY

PREFACE

Pursuant to Supreme Court Rule 10(c) the Supreme Court should allow the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit because the latter decided an important federal question in a way that utterly conflicts with relevant decisions of this Court.

In the present case a search warrant prepared and executed by Respondent, Officer Webb, on August 29, 2001, contained no particularity of description of the place to be searched or things to be seized. No affidavit was served with the warrant.

The Court of Appeals erred in ruling that the search and seizure was not a violation of the Fourth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment of the same, and that Officer Webb was entitled to qualified immunity.

Unlike the usual Section 1983 case, the issues are not questions of degree of whether force used was excessive, whether the amount of evidence

constituted probable cause or whether officers' conduct was reasonable or unreasonable.

This is a case in what we could call the "steel trap type" "apparent" category, where the questions of Fourth Amendment violation and qualified immunity are not matters of degree but plain and unambiguous.

This principle is illustrated by the cases *Groh v. Ramirez, 540 U.S. 551, 127 S. Ct. 1284, 157 L.Ed.2d 1068 (2004)* and *U.S. v. Lanier, 520 U.S. 259, 117 S. Ct. 1219, 137 L.Ed.2d 432 (1997).*

In this case the search warrant prepared and served by Officer Webb contained absolutely no particularity of description of the place to be searched or things to be seized and was not accompanied by a copy of the affidavit. This was a clear violation of Mr. Battle's inalienable rights secured by the Fourth Amendment. When officers, led by Officer Webb, burst onto Mr. Battle's premises and began to seize and take away his files, not only regarding workers' compensation but also other insurance files and personal files, Mr. Battle had the right to know, then and there, what these people's authority was, what their need to search was, if they had come to the right place, if he were the right

person, and what were the limits of the authority of these strangers.

Mr. Battle was wantonly denied the required benefits of these rights.

As the Supreme Court said in *Groh, supra*: "The warrant was plainly invalid. The *Fourth Amendment* states unambiguously that 'no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized.*'" (P 557)

The *Groh, supra*, decision further held: "We have clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant" citing *Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L.Ed.2d 431 (1965), (P 559).*

On qualified immunity, *Groh, supra*, held: "Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." (P 563)

Battle emphasized to the courts below the unambiguous text of the Fourth Amendment, *Groh, supra*, and other citations.

The courts below disregarded this emphasis on the ground that *Groh, supra*, was decided in 2004, and the search warrant was taken on August 29, 2001.

Apparently, it was overlooked that the Bill of Rights was ratified on December 15, 1791, and the warrant in *Groh, supra*, was taken in February, 1997.

The warrant in *Groh, supra*, contained a particularity of description of the place to be searched but not of the things to be seized.

The Supreme Court held that the Fourth Amendment violation was plain in 1997, and that, at that time, no reasonable officer could have believed otherwise.

Certainly then, Webb's total absence of any particularity of description at all, was a more egregious violation of the Fourth Amendment in 2001, and, at that time, no reasonable officer could have believed otherwise.

1. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SEARCH WARRANT, WHICH CONTAINED NO PARTICULARITY OF DESCRIPTION AND WAS NOT ACCOMPANIED BY A COPY OF THE AFFIDAVIT, WAS NOT A VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Court of Appeals held that in this case there was not a Fourth Amendment violation. (P 6) It held that under the case of *U.S. v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982)*, in some circumstances, it could be permissible to leave a copy of the warrant without the supporting affidavit at the time of the search due to the need for confidentiality in an investigation.

The Court then says: "Because Webb's affidavit was incorporated into the warrant and specified the places to be searched and the items to be seized, Battle cannot show any constitutional violation." (P-7)

In addition to the disregard by the Court of Appeals of the fact that there was no incorporation of any affidavit, *Wagneux, supra*, is totally inapposite to the present case.

In *Wuagneux* (P 1350) the warrant itself listed eleven categories of particularity of description. One listed category was ambiguous. (PP 1350, 1351) The Court held: "We conclude the (later presented) affidavit may be used to explain an ambiguity in the terms of the warrant." (P 1351)

The *Wuagneux* holding has absolutely no similarity to the present case where there was a total absence of particularity of description in the search warrant and the affidavit did not accompany the search warrant.

In *Groh* the Supreme Court distinguishes and rejects the type argument made by the Court of Appeals' misapplication of *Wuagneux*. (P 557):

Petitioner argues that even though the warrant was invalid, the search nevertheless was "reasonable" within the meaning of the *Fourth Amendment.*

We disagree. This warrant did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items. Nor did it make what fairly could be characterized as a mere technical mistake or typographical error. Rather, in the space set aside for a description of the items to be seized, the warrant stated that the items consisted of a "single dwelling residence . . . blue in color." **In other words, the warrant did not describe the items to be seized *at all.* In this respect the warrant was so obviously deficient that we must regard the search as "warrantless" within the meaning of our case law.** *(Citations omitted).* **Because "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'" stands "'[a]t the very core' of the *Fourth Amendment*,"** *(Citations omitted),* our

> cases have firmly established the "'basic principle of *Fourth Amendment* law' that searches and seizures in side a home without a warrant are presumptively unreasonable," *(Citations omitted)* [**1291] thus, "absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *(Citations omitted)* **(Emphasis Supplied)**

Though the warrant drafted by Webb said: "See attached affidavit of Agent J. Ronnie Webb", no affidavit was either attached or accompanied the warrant. What Webb testified to 16 months later was that an affidavit, which he first produced at that time, was the true affidavit, rather than one he had furnished earlier to counsel ". . . as a matter of courtesy and professionalism." (!)

The basis of the unconstitutionality of a search warrant lacking a particularity of description is no new innovation. The following are samples of the application of this venerable rule:

Stanford v. Texas, 379 U.S. 476, 512, 85 S. Ct. 506, 13 L.Ed.2d 431 (1965) held:

> (T)he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken nothing is left to the discretion of the officer executing the warrant. *Marron v. United States, 275 U.S. 192, at 196.*

Marron, supra, also in *48 S. Ct. 74, 72 L.Ed. 231 (1927).*

The case of *U.S. v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L.Ed.2d 538 (1977)*, in holding search of a footlocker without a warrant a violation of the Fourth amendment, emphasized the importance of the principle:

> (O)nce a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization "particularly describing the place to be searched and the persons or things to be seized." Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.

Camara v. Municipal Court, 387 U.S. 523, 532 (1967)

See also *Massachusetts v. Sheppard, 468 U.S. 981(5), 104 S. Ct. 3424, 82 L.Ed.2d 737 (1984).*

Therefore, the search in the present case was a categorically apparent violation of the Fourth Amendment, in the sense of being obvious and not a matter of degree.

2. THE COURT OF APPEALS ERRED IN HOLDING THAT WEBB, WHO PREPARED AND EXECUTED THE SEARCH WARRANT WAS ENTITLED TO QUALIFIED IMMUNITY BECAUSE BATTLE'S RIGHTS TO BE NOTIFIED AT THE TIME OF THE SEARCH AND SEIZURE OF THE PARTICULARITY OF DESCRIPTION WERE NOT CLEARLY ESTABLISHED.

The Court of Appeals held that Webb, who prepared and executed the search warrant was entitled to qualified immunity because Battle's rights to be notified at the time of the search and seizure of the particularity of description were not clearly established.

The Court of Appeals recognized that *Groh, supra*, where the warrant described the place to be searched but not the things to be seized, held that there could

be no qualified immunity for Groh because the text of the Fourth Amendment specifically required particularity and, thus, the right was clearly established and the officer should have known that the warrant was deficient. (P-8)

Then, the Court of Appeals held:

> The *Groh* decision issued in 2004. Prior to that date, the case law of this Circuit did not clearly establish that Webb's conduct was improper. See *Wuagneux, 683 F.2d 1343 911th Cir. (1980).*

Wuagneux has already been shown herein to be inapplicable. Since the text of the Fourth Amendment clearly established the right of the citizen to have particularity of description in the warrant, therefore, the right has been clearly established since the Bill of Rights was ratified on December 15, 1791.

When Webb took the warrant on August 29, 2001, the right had been clearly established for 209 years.

Any officer who had the most minimal instruction in the law of search and seizure should have known that the Fourth Amendment required that particularity of description be in the warrant.

The Groh decision did not establish the right in 2004. *Groh, supra*, recognized that the right was made clear by the text of the Fourth Amendment and that when Groh took his warrant in 1997, any reasonable officer should have known of the right.

Many major decisions of the Supreme Court clearly recognized the right well before 2001.

*Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L.Ed.2d 431 (1965),*36 years before this case, held:

> The protections of the *Fourth Amendment* are by the *Fourteenth Amendment* guaranteed against invasion by the States, and the States may not constitutionally issue general warrants which do not describe with particularity the things to be seized, ...

The case of *United States v. Chadwick, 433 U.S. 1,9, 97 S. Ct. 2476, 53 L.Ed.2d 538 (1977),* 24 years before this case, which held the search of a trunk to be a Fourth Amendment violation, clearly recognized the right:

> (O)nce a lawful search has begun it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization "particularity describing the place to be searched and the persons or things to be

> seized." Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search. *Camara v. Municipal Court 387 U.S. 523, 532 (1967)*

The case of *Marron v. U.S., 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927),* 74 years before this case, decided on other grounds, recognized the right as clearly established:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

The case of *Massachusetts v. Sheppard, 468 U.S. 981, 988, 104 S. Ct. 3424, 82 L.Ed.2d 737 (1984),* 17 years before this case, held that an invalid warrant was the fault of the magistrate but clearly recognized the right:

> (T)he uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the *Fourth Amendment* is

unconstitutional. *Stanford v. Texas, 379 U.S. 476 (1965), et. al.*

The major premise of the Court of Appeals' reasoning was that to show that the right was clearly established at the time required the citation of a case "materially similar".

The Supreme Court rejected that standard in reversing the Court of Appeals in the case of *Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L.Ed.2d 666 (2002)*, even on a case where the issue was of excessive force, a matter of degree:

> (B) Respondents may nevertheless be shielded from liability for their constitutionally impermissible conduct if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S. Ct. 2727.* **In its assessment, the Eleventh Circuit erred in requiring that the facts of previous cases and Hope's case be "materially similar."** Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful. Officers sued in a

§1983 civil action have the same fair notice right as do defendants charged under 18 U.S.C. *§242*, which makes it a crime for a state official to act willfully and under color of state law to deprive a person of constitutional rights. This Court's opinion in *United States v. Lanier, 520 U.S. 259, 137 L.Ed.2d 432, 117 S. Ct. 1219*, a §242 **case, makes clear that officials can be on notice that their conduct violates established law even in novel factual situations. In deed, the Court expressly rejected a requirement that previous cases be "fundamentally similar." Accordingly, the salient question that the Eleventh Circuit should have asked is whether the sate of the law in 1995 gave respondents fair warning that Hope's alleged treatment was unconstitutional**. PP. 7-10. **(Emphasis Supplied)**

CONCLUSION

1. The search warrant, with no particularity of description and not accompanied by an affidavit, was an obvious violation of the Fourth Amendment.

2. In 2001, any reasonable officer should have known that the right of the citizen to have the particularity of description in the search warrant was a clearly established right.

Therefore, the Supreme Court should grant the writ of certiorari to the Court of Appeals and correct the obvious errors of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,
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APP 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

FILED 4/16/2008

FRANK BATTLE, SR,	:	
	:	
Plaintiff,	:	CIVIL ACTION FILE NO.
	:	2:07-CV-97
v.	:	
	:	
J. RONNIE WEBB,	:	
	:	
Defendant.	:	

ORDER

The captioned case is before the court for consideration of defendant's motion to dismiss [4-1].

I. Background

On August 29, 2001, defendant presented an affidavit to the magistrate court of Dekalb County, Georgia, in connection with his investigation of allegations of fraud against plaintiff. (Def.'s Mot. Dismiss 3). The affidavit specified the location to be searched and the property to be seized. (*Id.*). The search warrant issued referenced the attached

affidavit but did not otherwise provide any information regarding the details of the search. (Pl.'s Resp. 3).

Later that day, defendant executed the search warrant at plaintiff's business and seized numerous personal and insurance files. (Pl.'s Compl. ¶¶ 6-7).

Although defendant had a copy of the affidavit supporting the warrant at the time of the search, he did not leave it for plaintiff; he left only the search warrant and an inventory of the items seized. (Pl.'s Resp. 3-4). After the search, plaintiff's counsel requested a copy of the supporting affidavit. (*Id.*) Defendant provided a different affidavit, which contained no allegation of factual probable cause but appeared to be authentic. (*Id.*).

A Dekalb County Grand Jury indicted plaintiff on August 22, 2002. (*Id.*). Plaintiff filed a motion to suppress on October 9, 2002, challenging the legality of the search and seizure. (*Id.*). At a hearing on the motion, defendant revealed that he gave plaintiff a false affidavit in order to prevent him from learning the sources of defendant's information. (*Id.* at 5). Plaintiff then amended his motion to suppress, alleging that the warrant was insufficient on its face

because it failed to describe the location to be searched and the items to be seized. (*Id.* at 6). The trial court denied the motion to suppress, but issued a certificate of interlocutory appeal, which was granted by the Georgia Court of Appeals. (*Id.*). The Georgia Court of Appeals affirmed the trial court's decision. (*Id.*).

On September 8, 2004, the Georgia Supreme Court granted defendant's petition for certiorari and remanded the case to the Georgia Court of Appeals for reconsideration in light of the United States Supreme Court's ruling in *Groh v. Ramirez*, 540 U.S. 551 (2004). (*Id.*). The Court of Appeals determined that, based on *Groh*, the search and seizure violated the Fourth Amendment due to defendant's failure to leave the supporting affidavit at plaintiff's premises. (*Id.* at 7). Upon remittur, the trial court suppressed the evidence seized during the search. (*Id.*). On November 18, 2005, plaintiff's indictment was *nolle prossed*. (*Id.*).

On August 27, 2007, plaintiff filed the instant action pursuant to 42 U.S.C. § 1983 [1-1], seeking damages arising out of defendant's illegal search and seizure. (Pl.'s Compl. ¶ 1). On October 4, 2007, defendant moved to dismiss plaintiff's complaint [4-1] as barred by the statute of limitations or, in the

alternative, because defendant is entitled to qualified immunity.

II. Standard of Review

When considering a Rule 12(b)(6) motion to dismiss, the court must accept the allegations in the complaint as true and construe all facts in a light most favorable to the plaintiff. *Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999). A plaintiff's complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1960 (2007). The threshold of sufficiency for a complaint is exceedingly low; however, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1959.

A district court may take judicial notice of certain facts without converting a motion to dismiss into a motion for summary judgment. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999). "Public records are among the permissible facts that a district court may consider." *Universal Express*, Inc. *v. United States SEC*, 177 Fed. Appx. 52, 53 (11th Cir. 2006). Because they are public record and

referred to and relied upon by plaintiff, the orders of plaintiff's state court proceedings may be considered by the court.

III. Analysis

As mentioned above, defendant contends that plaintiff's § 1983 case fails as a matter of law for two independent reasons. First, because the search occurred on August 29, 2001, defendant argues that the claim is barred by the statute of limitations. See *Uboh v. Reno*, 141 F.3d 1000, 1002 (11th Cir. 1998)(stating that Georgia's two-year personal injury statute of limitations applies to actions brought pursuant to 42 U.S.C. § 1983). Second, even if plaintiff establishes the timeliness of his action, defendant argues that the court should nevertheless dismiss the case because he is entitled to qualified immunity. Though the parties contest the accrual date of plaintiff's claim, the court will proceed directly to an evaluation of plaintiff's substantive claim and defendant's assertion of qualified immunity.

Qualified immunity shields government officials performing discretionary acts from liability under § 1983 if their acts do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Jackson v.*

Sauls, 206 F.3d 1156, 1164 (11th Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The purpose of this immunity is to allow government officials to carry out their discretionary duties without fear of personal liability or harassing litigation, thus protecting from suit "all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (citing *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Willingham v. Loughnan*, 261 F.3d 1178, 1187 (11th Cir. 2001)). Therefore, qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Because qualified immunity is a defense not only from liability but also from suit, it is "important for a court to ascertain the validity of a qualified immunity defense as early in the lawsuit as possible." *Lee*, 284 F.3d at 1194 (quoting *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1370 (11th Cir. 1998)).[1]

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[1] "While qualified immunity is typically addressed at the summary judgment stage of the case, the defense may be raised and considered on a motion to dismiss; the motion will be granted if the 'complaint fails to allege the violation of a clearly established constitutional right.'" *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001) (citation omitted).

In analyzing a claim of qualified immunity, the court must first consider whether the public official "was acting in the scope of his discretionary authority when the allegedly wrongful acts occurred." Lee, 284 F.3d at 1194. Having established that defendant was acting within his discretionary authority, the burden shifts to plaintiff to establish that qualified immunity is not appropriate. *Id.* The Supreme Court has set forth a two-part test for evaluating a claim of qualified immunity. See *Saucier*, 533 U.S. at 201. As a "threshold question," the court must ask whether, "taken in the light most favorable to the party asserting the injury . . . the facts alleged show the [government official's] conduct violated a constitutional right." *Id.* If a constitutional violation can be established on the plaintiff's facts, the court must then determine "whether, at the time of the incident, every objectively reasonable [enforcement agent] would have realized the acts violated already clearly established federal law." *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1278-79 (11th Cir. 2004) (citing *Saucier*, 533 U.S. at 201-02).

In this case, there has been no dispute that when defendant executed the search warrant, he was undertaking a discretionary function within his authority as an employee of the Enforcement Division

of the Georgia State Board of Workers' Compensation. The two-part evaluation of defendant's claim of qualified immunity, however, is considerably more complicated.

A. Constitutional Violation

The court begins by considering whether defendant violated plaintiff's constitutional rights by executing the search warrant at issue. The Fourth Amendment requires that warrants "particularly describe the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. A warrant is sufficiently particular when it enables the searcher to "reasonably ascertain and identify the things which are authorized to be seized." *Steele v. United States*, 267 U.S. 498, 503-04 (1925).

Though the "Fourth Amendment by its terms requires particularity in the warrant, itself," *Groh v. Ramirez*, 540 U.S. 551, 557 (2004), warrants may become sufficiently particular by cross-referencing other documents. A majority of circuits have held that a warrant may be construed with reference to a supporting application or affidavit "if the warrant uses appropriate words of incorporation and the supporting document accompanies the warrant." *Id.*

at 557-58 (citations omitted).[2] Though it has not articulated a bright-line rule for incorporation, in *United States v. Wuagneux,* 683 F.2d 1343, 1351 n.6 (11th Cir. 1982), the Eleventh Circuit found that an ambiguity in a warrant could be clarified by an affidavit, which was not attached, when the affidavit and the testifying agent were present at the search location and the agent had explained the contents of the affidavit to the other officers present. In so finding, the court urged a "more flexible approach" than the rigid requirement of incorporating language and attachment.[3] *Id.*

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[2] The Fourth and Sixth Circuits hold that "it is sufficient either for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself." See *United States v. Hurwitz*, 459 F.3d 463, 471 (4th Cir. 2006); *Baranski v. Fifteen Unknown ATF Agents of the Bureau of ATF*, 452 F.3d 433, 447 (6th Cir. 2006)).

[3] Plaintiff argues that "*Groh* plainly says that to sustain a search warrant which lacks particularity . . . there [must] be appropriate words of incorporation . . . [and] the supporting document must accompany the search warrant." (Pl.'s Resp. 22). *Groh*, however, establishes no such rule. Though the Court noted that a majority of circuits generally follow this approach, it expressly declined to consider the question of incorporation by reference because neither requirement was satisfied by the warrant in that case. *Groh*, 540 U.S. at 558.

Plaintiff does not dispute that the warrant incorporated the affidavit or that defendant possessed the affidavit while executing the search. He maintains, however, that defendant's failure to leave a copy of the affidavit at the search site renders the search unconstitutional. Given the Eleventh Circuit's analysis in *Wuagneux*, the court cannot agree. In *Wuagneux*, the court was confronted with what seemed to be a deficient search warrant. Instead of declaring the search unconstitutional, the court allowed a supporting affidavit to clarify the ambiguity in the warrant, even though the affidavit was "neither incorporated into the warrant by express reference nor attached to an accompanying warrant." *Id.* The Eleventh Circuit noted:

> Although self-restraint by searching officers, by itself, may not cure an overbroad warrant, we conclude that in this case the searchers were adequately informed of the limitations on the search given their instruction by Agent O'Dea, their opportunity to read the affidavit, and its presence at the search site.

Id. (citations omitted). See also *United States. v. Cary*, No. 07-074, 2008 U.S. Dist. LEXIS 1027 at *9-10 (N.D. Ga. January 4, 2008) (upholding a search

where the searching officer was familiar with the contents of an affidavit incorporated by the warrant, though the officer did not possess a copy of the affidavit at the search or leave a copy at the searched premises); *United States v. Maali*, 346 F. Supp. 2d 1226, 1243 (M.D. Fla. 2004) ("[I]n this circuit such attachment is not required for successful incorporation of its terms into the warrant, at least where . . . the affidavit was provided to the searchers.").

In the instant case, the warrant specifically incorporated the affidavit and the affidavit was present at the time of the search, but, as in Wuagneux, defendant left only the warrant itself and an inventory of items seized at the search site. The warrant's incorporation of the affidavit and the presence of the affidavit at the search site for inspection sufficiently guaranteed that the search would not exceed the scope of the search authorized by the magistrate judge.[4] The court therefore concludes that the search was constitutional even though the affidavit was not attached.

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[4] In fact, at no point does plaintiff allege that any items beyond the scope of the warrant or affidavit were seized.

The court does not condone defendant's failure to describe with particularity the location to be searched or the items to be seized on the face of the warrant, his refusal to leave a copy of the affidavit with plaintiff, or his provision of an incomplete affidavit to plaintiff after the search.[5] Such practices hardly ensure that "both the searches and the person whose premises are to be searched are informed of the scope of the searchers' authority." *Wuagneux*, 683 F.2d at 1351 n.6. While "it is preferable that the person whose premises are to be searched be informed of the searching agents' authority at the time of the search,"

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[5] Though not the one presented to the magistrate judge, the affidavit sent to plaintiff described with particularity the location to be searched and the items to be seized but lacked sufficient statements of probable cause. Plaintiff, therefore, learned "the limits of authority of these strangers" and that defendant "did come to the right place" days after the search. (Pl.'s Resp. 22). See *Wuagneux*, 683 F.2d at 1351 n. 6 ("We are mindful that even a total inability to serve the warrant on a property owner does not necessarily render the execution of the warrant unlawful.") (citing *Walter v. United States*, 447 U.S. 649, 658 n. 10 (1980)). While defendant revealed his dishonest behavior months after the search, plaintiff received the actual affidavit for use in his motion to suppress. *See Wuagneux*, 683 F.2d at 1351 n.6 (citing the provision of the affidavit to the party searched for use in preparing the motion to suppress as partially satisfying the plaintiff's right to information about the search).

the court cannot find that, under *Wuagneux*, defendant's failure to attach the affidavit resulted in a constitutional violation of plaintiff's rights. *Id.*

B. Clearly Established

Moreover, the court finds that even if plaintiff were able to establish that defendant's actions violated plaintiff's constitutional rights, such rights were not–and are still not–clearly established. Constitutional or statutory rights are "clearly established" for qualified immunity purposes if the controlling case law has "earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that [the conduct at issue] violates federal law." *Lassiter v. Ala. A&M Univ. Bd. of Trs.*, 28 F.3d 1146, 1149 (11th Cir. 1994). Although officials can still be on notice that their conduct violated established law in novel situations, the state of the law at the time of the incident in question must give the government actor "fair warning" that his conduct violated the law. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Plaintiff fails to cite any authority that would have put defendant on notice that his actions violated plaintiff's constitutional rights at the time of the

search. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (stating that pre-existing law at the time must make apparent the unlawfulness of the behavior at issue). The court can find no law indicating that, at the time of the search, defendant was required to attach the supporting affidavit to the warrant. Indeed, when affirming the trial court's denial of plaintiff's motion to suppress, the Georgia Court of Appeals found that defendant's failure to leave a copy of the supporting affidavit at the search site did not render the search unconstitutional. While the state courts' determinations do not affect the court's decision here, "when a state court judge upholds the constitutionality of police actions, that alerts [the court] to be particularly careful in concluding that the law was truly clearly established. . ." *Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989).

Plaintiff relies primarily on *Groh*, a case decided three years after the search at issue, when arguing that "it is well established that a supporting document cannot be used to cure a warrant with lack of particularity of description unless it is incorporated and accompanies the warrant." (Pl.'s Resp. 20). As noted above, though *Groh* declined to address the issue of incorporation, the Court indicated that a majority of circuits require both incorporating language and attachment for a valid incorporation.

Groh, 540 U.S. at 557-58. Plaintiff, however, may not rely on the incorporation requirements of other courts of appeals to determine clearly established law in this circuit. *See Marsh v. Butler County*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (stating that only decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state "clearly establish" laws for the purposes of qualified immunity analysis).

Plaintiff's reliance on the Court's denial of qualified immunity in *Groh* is similarly misplaced. *See* Pl.'s Resp. at 18 ("[T]he Supreme Court held that the contours of the right were clearly established four and one half years before defendant presented his search warrant. . .). The warrant at issue in *Groh* utterly failed to describe the items to be seized and did not incorporate by reference the supporting affidavit and application. Because the warrant "did not describe the items to be seized at all," the Court concluded that "the warrant was so obviously defective that [it] must regard the search as 'warrantless' within the meaning of our case law." *Groh*, 540 U.S. at 558. The warrant in this case incorporated the affidavit; the Court's denial of qualified immunity in *Groh* therefore has no bearing on whether or not a law requiring that defendant

leave the affidavit at plaintiff's office was clearly established at the time of the search.

The lack of precedent providing "real notice of practical value [to defendant], considering the special circumstances" of this case rather than mere "talk of some generalized, intellectual concept" is fatal to plaintiff's claim that defendant violated his clearly established constitutional rights. *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002). As plaintiff cannot allege that defendant's actions violated any clearly established constitutional right, plaintiff has not met his burden of showing that qualified immunity is not appropriate. Accordingly, defendant is entitled to qualified immunity.

IV. Conclusion

Accordingly, defendant's motion to dismiss [4-1] is hereby GRANTED. IT IS SO ORDERED, this 16th day of April, 2008.

s/William C. O'Kelley
WILLIAM C. O'KELLEY
Senior United States District Judge

APP 17

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

FRANK BATTLE, SR., Plaintiff,	:	
	:	CIVIL ACTION FILE
vs.	:	
	:	NO. 2:07-cv-97-WCO
J. RONNIE WEBB, Defendant.	:	

J U D G M E N T

This action having come before the court, Honorable William C. O'Kelley, Senior United States District Judge, for consideration of defendant's motion to dismiss, and the court having granted said motion, it is

Ordered and Adjudged that the action be, and the same hereby, is **dismissed.**

Dated at Gainesville, Georgia, this 16th day of April, 2008.

JAMES N. HATTEN
CLERK OF COURT

By: s/Stacey Kemp
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
April 16, 2008
James N. Hatten
Clerk of Court

By: s/Stacey Kemp
Deputy Clerk

APP 19

[DO NOT PUBLISH]

FILED U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 31, 2008
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT U.S. COURT OF APPEALS

Non-Argument Calendar

D. C. Docket No. 07-00097-CV-WCO-2

FRANK BATTLE, SR.,

Plaintiff-Appellant,

versus

J. RONNIE WEBB,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(October 31, 2008)

Before BIRCH, PRYOR and KRAVITCH, Circuit Judges.
PER CURIAM:

Frank Battle, Sr. appeals the district court's dismissal of his civil rights action, brought pursuant to 42 U.S.C. § 1983. After a thorough review of the record, we affirm.

Battle filed his civil action against J. Ronnie Webb, a member of the Enforcement Division of the Georgia State Board of Workers' Compensation, alleging violations of the Fourth Amendment in connection with the August 29, 2001, search of his insurance business and the seizure of various files.[1] Webb obtained a search warrant, but the warrant did not specify the place to be searched or the items to be seized. Instead, the warrant incorporated Webb's attached affidavit, which identified the place to be searched as Battle's office and listed the documents and other evidence to be seized. When Webb executed the warrant, he left a copy of the warrant and

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In 2000, the State Board of Workers Compensation began investigating Battle in connection with an insurance fraud scheme, in which Battle would collect premiums to purchase insurance policies but instead of purchasing the policies, Battle allegedly converted the premiums for his own purposes. As part of this investigation, Webb conducted a search of Battle's office. It is the events surrounding this search that led to the instant civil action

inventory of the items seized, but he did not leave a copy of the affidavit, and no affidavit was attached to the warrant at that time. Webb later explained that he did not supply a copy of the supporting affidavit because he did not want to risk divulging confidential information of the investigation.

In 2002, as a result of the search, Battle was indicted by a DeKalb County grand jury. Battle filed a motion to suppress the evidence seized. After conducting several hearings, the state court denied the motion to suppress. Following an interlocutory appeal, in which the decision was affirmed, the state supreme court granted certiorari review and remanded the issue in light of the U.S. Supreme Court's decision in Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). On remand, the state court granted the motion to suppress because the failure to leave a copy of the affidavit with Battle at the time of the search rendered the search and seizure illegal. See Battle v. State, 275 S.E.2d 506, 507 (Ga. 2005).

Nevertheless, while the case was pending, Nationwide Insurance cancelled its contract with Battle, resulting in significant financial and business

damages to Battle.[2] Thereafter, in 2005, the prosecutor dismissed the case against Battle. On August 27, 2007, Battle filed the instant complaint.

Webb moved to dismiss, Fed.R.Civ.P. 12(b), alleging that the complaint was barred by the statute of limitations and, alternatively, that he was entitled to qualified immunity. Without addressing the timeliness of the action, the district court granted the motion to dismiss on qualified immunity grounds. The district court first concluded that there was no constitutional violation even though the affidavit was not attached to the copy of the warrant given to Battle at the time of the search. In addition, the court concluded that, even if there was a constitutional violation, the right was not clearly established at the time of the violation. The court noted that Groh was not decided until 2004, three years after the search occurred. This appeal followed.[3]

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[2] Battle alleges that Nationwide Insurance cancelled the contract after it apparently learned of the allegations. However, the evidence submitted does not indicate Nationwide Insurance's reasons for canceling the contract.

[3] To the extent that Battle alleged a claim of malicious prosecution, that claim fails, as Battle has not named the prosecutor who was responsible for obtaining an indictment. Eubanks v. Gerwen, 40 F.3d 1157, 1161 (11th Cir. 1994).

Battle urges us to reverse the dismissal because the search warrant was facially invalid under Groh, and the constitutional right under the Fourth Amendment was clearly established by the terms of the amendment itself.

We review de novo a trial court's ruling on a motion to dismiss a complaint on qualified immunity grounds. Long v. Slaton, 508 F.3d 576, 579 (11th Cir. 2007). In determining whether the complaint alleges the violation of a clearly established right, we accept the allegations in the complaint as true and draw all reasonable inferences therefrom in favor of the plaintiff. Id. We first ask whether a constitutional violation occurred; we then ask whether the violation was already clearly established by the law at the time. Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001); see also Hope v. Pelzer, 536 U.S. 730, 736, 122 S.Ct. 2508, 2513, 153 L.Ed.2d 666 (2002). "[D]etermining whether a constitutional right was clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" Vinyard v. Wilson, 311 F.3d 1340, 1349 (11th Cir. 2002) (quoting Saucier, 533 U.S. at 201). The Supreme Court has variously defined the relevant, dispositive inquiry as "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted,"

Saucier, 533 U.S. at 202, and "whether the state of the law ... gave [the officer] fair warning" that his actions were unconstitutional, Hope, 536 U.S. at 741. In most cases, fact-specific precedents are necessary to give an officer fair warning of the applicable law. See Vinyard, 311 F.3d at 1351-1352.

To demonstrate that the law at the time clearly established that Webb's conduct would violate the Constitution, Battle should point to either (1) earlier case law from the Supreme Court, this court, or the highest court of Georgia that is materially similar to the current case and therefore provided clear notice of the violation or (2) general rules of law from a federal constitutional or statutory provision or earlier case law that applied with "obvious clarity" to the circumstances, establishing clearly the unlawfulness of Webb's conduct. See Marsh v. Butler County, 268 F.3d 1014, 1031-1033 (11th Cir. 2001) (en banc); Willingham v. Loughnan, 321 F.3d 1299, 1301-1303 (11th Cir. 2003); Vinyard, 311 F.3d at 1349-53. Thus, to avoid dismissal on qualified immunity grounds, Battle has the burden of demonstrating that Webb-at the pertinent time and given the specific circumstances of this case-had fair notice that his conduct would violate clear federal law. Long, 508 F.3d at 584 (citation omitted).

Battle cannot meet this burden. The Fourth Amendment provides,

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Here, Battle cannot show a Fourth Amendment violation. As this court has held, a warrant may satisfy the requirements of the Fourth Amendment through incorporation. United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982). In that case, an IRS agent requested a search warrant in which he identified eleven categories of records he was seeking. One of the categories listed called for "the receipt and disbursement of kickback funds." In support of the warrant, the agent submitted an affidavit detailing the kickbacks he believed had been paid and received. 683 F.2d at 1349-1351. The defendant challenged the sufficiency of the warrant for failure to state with particularity the items to be

seized. After the district court denied the motion to suppress, this court concluded that an affidavit incorporated into a warrant application could cure a defect or ambiguity in the application if the affidavit was attached to the application. Id. at 1351 n.6. This court further acknowledged that, in some circumstances, it could be permissible to leave a copy of the warrant without the supporting affidavit at the time of the search due to the need for confidentiality in an investigation. Id. Because Webb's affidavit was incorporated into the warrant and specified the places to be searched and the items to be seized, Battle cannot show any constitutional violation.

Even if we were to conclude that there was a constitutional violation and the warrant was facially invalid, the law was not clearly established at the time of the search.

In Groh, the Supreme Court considered the legality of a search premised on a warrant that failed to describe with particularity the place to be searched and the items to be seized. 540 U.S. at 554. The application specified the items agents sought, and in an accompanying affidavit, the agent explained the basis for his belief the items would be found during a search. However, the application did not specify the items to be seized and did not incorporate the

affidavit. Id. at 554-555. Upon review, the Court concluded that the warrant was facially invalid because the Fourth Amendment required particularity of the items to be seized. Id. at 557. The Court further stated that the amendment required particularity in the warrant and not the supporting documents. Id. at 557. The Court explained, however, that it was not deciding whether a warrant could incorporate or cross-reference other documents, and it expressly recognized that many circuits have held that a court may consider a warrant with reference to supporting affidavits "if the warrant uses appropriate words of incorporation and if the supporting document accompanies the warrant." Id. at 557-558. Because the warrant application in Groh did not incorporate, and neither the application nor the affidavit accompanied the warrant, the court did not address the issue of incorporation further. Id. at 558. The Court then concluded that there could be no qualified immunity because the text of the Fourth Amendment specifically required particularity and, thus, the right was clearly established and the officer should have known that the warrant was deficient. Id. at 563-564.

The Groh decision issued in 2004. Prior to that date, the case law of this circuit did not clearly establish

that Webb's conduct was improper. See Wuagneux, 683 F.2d 1343 (11th Cir. 1982).

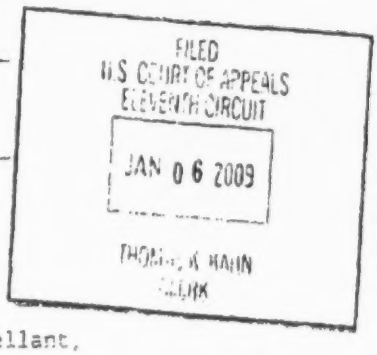
Thus, at the time Webb searched Battle's business, the existing case law arguably permitted Webb's conduct. The warrant in Battle's case incorporated Webb's affidavit and Webb explained that he did not leave a copy of the affidavit at the time of the search due to confidentiality concerns. In light of the case law at the time of the search, we cannot conclude that the rights were clearly established.

Accordingly, we AFFIRM the district court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-12696



APP 29

FRANK BATTLE, SR.,

Plaintiff-Appellant,

versus

J. RONNIE WEBB,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, PRYOR and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT.

Phyllis Kravitch

UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-12696-FF

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 16 2009
JOHN LEY
CLERK

FRANK BATTLE, SR.,

Plaintiff-Appellant,

versus

J. RONNIE WEBB,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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ORDER:

( ) The motion of Appellant, Frank Battle, Sr., for (x) stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellant, Frank battle, Sr., for (x) stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including April 6, 2009, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Phyllis Kravitch

UNITED STATES CIRCUIT JUDGE

ORD-45